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ALEXANDRIA, VA 22313-1450
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Paper No. 10

In re Application of
Louis J. Panaccione
Application No. 10/086,509
Filed: February 28, 2002
Attorney Docket No. PURP01/0010

: DECISION ON PETITION

This is a decision on the petition filed by facsimile transmission on March 24, 2004 by which petitioner requests withdrawal of the examiner's holding that this application stands abandoned for failure to file a timely reply to the Office action dated June 16, 2003. The petition is considered pursuant to 37 CFR 1.181, and no fee is required.

The petition is dismissed.

Petitioner alleges that a reply to the Office letter in question was in fact filed by facsimile transmission on September 25, 2003. Petitioner alleges that this reply was both a *bona fide* reply and a timely reply because petitioner had authorized a charge of the \$55.00 fee for a one month extension of time against counsel's credit card, but due to "a clerical error in completing the fee transmittal, the one-month extension of time fee was not charged."

Petitioner supports these allegations by furnishing a copy of the amendment as filed by facsimile transmission, a copy of a fee transmittal letter indicating that there was a fee due of \$55.00 for the extension of time, and a declaration of counsel. In the declaration, counsel states:

"Following receipt of the Notice of Abandonment, I was notified that due to a clerical error in completing the fee transmittal, the additional \$55.00 fee for the one-month extension of time due for the response was not charged to my credit card. A new fee transmittal and Form PTO-2038 is enclosed herewith."

The record shows that a reply to the Office letter in question was in fact received in the on September 26, 2003, with a 37 CFR 1.8(a) certificate of transmission dated September 25, 2003. The reply consisted of twenty (20) pages. Nineteen (19) of those pages are present in the application file; presumably the twentieth page was the form PTO-2038 that authorized a charge against counsel's credit card for the claim fee surcharge of \$54.00. Included in the reply of record in the file is a fee transmittal sheet which shows only that a \$54.00 fee for six additional claims was due, and Office financial records show that the \$54.00 claim surcharge fee was in fact charged against counsel's credit card.

The record also shows that a letter was mailed on November 17, 2003, more than two months prior to the mailing of the Notice of Abandonment. That letter informed petitioner of the fact that no extension of time had been obtained with respect to the reply filed on September 26, 2003.

In light of the state of the record, the allegations discussed above and the evidence presented in support of those allegations is not clear on a critical point. What was the nature of the clerical error regarding the one month extension of time fee? Is petitioner alleging that the error was on the part of the Office, or was the error a failure to transmit authorization to charge the extension fee? Is it alleged that two separate fee transmittal sheets were transmitted, one dealing solely with the claim surcharge fees and one dealing solely with the extension fee? Were two PTO-2038 forms transmitted, one for each fee? When counsel states that "a new" fee transmittal and Form PTO-2038 are enclosed with the petition, does "new" mean "newly prepared" or does it mean a "new copy" of papers that were in fact originally transmitted with the reply filed on September 26, 2003? When counsel states that he was informed **following receipt of the Notice of Abandonment** that the \$55.00 extension fee was not charged, is counsel implying that the November 17, 2003 Office letter was not received? If that letter was received, what action did counsel take with respect thereto?

Petitioner is invited to file a renewed petition, without fee. In the renewed petition, the questions presented above should be addressed. Petitioner should furnish a copy of all PTO-2038 form(s) that were filed with respect to the reply filed on September 26, 2003. The renewed petition should be addressed to the undersigned and must be filed within two months of the date of this decision. See 37 CFR 1.181(f).

The application is being retained in Technology Center 3700 pending receipt of the renewed petition.

PETITION DISMISSED.



E. Rollins-Cross, Director
Technology Center 3700

Timothy J. Shea II, Esq.
200 Linden Street
Wellesley, MA 02482